FILE COPY

No. 61.

Office - Supreme Court, U. S.
FILED
OCT 11 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947.

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL DiRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MICHAEL DiRE.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

PAGE

Question Presented 1

Additional Statutes Involved 2

Statement 3

Summary of Argument 5

Argument 6

I.

The respondent's arrest was unlawful and the subsequent searches of his person illegal 6

II.

The search of respondent's person cannot be justified as incidental to the search of Buttitta's car 17

Conclusion 20

Table of Cases.

Agnello v. United States, 269 U. S. 20 ..... 6, 8, 16

Beard v. United States, (App. D. C.) 82 Fed. 2nd 837, 844 ..... 14, 15

Bilokimsky v. Tod, 263 U. S. 149 14

Boyd v. United States, 116 U. S. 616 ..... 7, 17

Bram v. United States, 168 U. S. 532 9

Byars v. United States, 273 U. S. 28, 29 8

Carroll v. United States, 267 U. S. 132 ..... 5, 8, 9, 12, 17, 18, 19, 21

Cassidy v. United States, 49 Fed. 2nd 504 19

Dumbra v. United States, 268 U. S. 435 ..... 11, 12, 15

Gambino v. United States, 275 U. S. 310 ..... 7, 8, 10, 11

Go-Bart Importing Co. v. United States, 282 U. S. 344 .. 6

PAGE

Grace v. United States, 287 U. S. 124, 128 6
Husty v. United States, 282 U. S. 694 .....11, 12, 15, 19
Ex Parte Jackson, 96 U. S. 727 10
Marron v. United States, 275 U. S. 192 7
People v. Defore, 242 N. Y. 13, 18 .....7, 8
Stacey v. Emory, 97 U. S. 642, 645 12
Stobble v. United States, 91 Fed. 2nd 69 (C. C. A. 7) 9
Stobble v. United States (C. C. A. 7) 91 Fed. 2nd 69 .. 19
Taylor v. United States, 286 U. S. 1 10
United States v. Lefkowitz, 285 U. S. 452, 467 6
United States v. Falcone, 311 U. S. 205 16
United States v. Valenti, (C. C. A. 2) 134 Fed. 2nd 362, certiorari denied, 319 U. S. 761 14
Weeks v. United States, 232 U. S. 383, 393 .....6, 7, 8

STATUTES.

Fourth Amendment 6, 10, 16
Internal Revenue Laws 14
National Prohibition Act 11
O. P. A. Ration Order No. 5C, Sec. 1394.8301 (b); 7 F. R. 9135 4
Section 177 (2) of the New York Code of Criminal Procedure 5
Section 177 (3) of the New York Code of Criminal Procedure 5, 9
Sec. 177 of the New York Code of Criminal Procedure 7, 8
Section 1394.8178 of O. P. A. Ration Order No. 5C. .2, 4
Section 8394.8301 (b) of Ration Order No. 5C 2
Section 301 of the Second War Powers Act 2, 4

MISCELLANEOUS.

Cornelius, Search and Seizure, p. 188 10

IN THE

Supreme Court of the United States

October Term, 1947.

No. 61.

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL DiRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MICHAEL DiRE.

Question Presented

The majority opinion of the Circuit Court of Appeals (159 F. 2nd 818) correctly states the question for decision as follows. (R. 43):

> "When an officer has been informed that two persons are to deal in counterfeit documents while they are riding in a motor car, has he reasonable grounds for believing that a third person who is riding in a car along with them is a party to that transaction?"

Additional Statutes Involved.

Section 1394.8178 of O.P.A. Ration Order No. 5C, issued pursuant to Section 301 of the Second War Powers Act of 1942, provides:

"Sec. 1394.8178 MUTILATION, DESTRUCTION, OR COUNTERFEITING OF COUPON BOOKS OR CERTIFICATES. (a) No person other than a person authorized pursuant to Ration Order No. 5C shall deface, mutilate, alter, burn or otherwise destroy any coupon book or bulk, inventory or other coupons (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence.

(b) No person shall counterfeit or forge any coupon book, or bulk, inventory, or other coupon, or any other evidence.

(c) No person shall transfer, receive a transfer of, possess, or use any forged, altered, or counterfeited coupon book or bulk, inventory or other coupon or other evidence.

(d) Any defacement, mutilation or alteration of a coupon or ration book in violation of any provision of this section shall render such coupon or book and the coupons therein, invalid. The detachment of any coupon from a ration book, except in accordance with the provisions of Sec. 1394.8153, shall render such coupon invalid..

(e) The provisions of paragraphs (a), (c), and (d) of this section shall not be applicable to public officials acting in the performance of their official duties."

Section 8394.8301 (b) of Ration Order No. 5C provides:

"(b) Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required, by any provision of Ration Order No. 5C may upon conviction be fined not more than $10,000 or imprisoned for not more than one year, or both, and shall be subject to such other penalties or action as may be prescribed by law."

Other Constitutional provisions and statutes involved are set forth in the brief for the UNITED STATES.

Statement.

On April 14, 1944, O'Donnell and Neff, O. P. A. investigators, accompanied by one Gross, a detective in the Buffalo Police Department, followed the car of one Frank Buttitta to Arkansas Street near Barton Street, in the City of Buffalo, New York (R. 4). They were acting on information furnished by one Reed, that he was going to purchase counterfeit gasoline coupons from Buttitta that afternoon (R. 15).

The officers at that time did not know who, if anyone, was in the car other than Buttitta and Reed (R. 9).

When Buttitta's car stopped and parked, the officers also stopped their car, and walked over to the Buttitta car. They saw Buttitta seated behind the wheel, the defendant DiRe seated next to him in the front seat, and Reed sitting in the rear seat, with two 100 gallon gasoline inventory coupons in his hand (R. 5, 9). Asked where he got the coupons, Reed said he got them from Buttitta (R. 5, 9, 15).

Although the officers had no knowledge at that time that DiRe had any coupons, genuine or counterfeit, on his person (R. 10), he was arrested (R. 5, 10) and subjected to a preliminary search of his person, at the car (R. 9, 15). This search revealed no coupons. DiRe was not told the reason for his arrest (R. 10).

The three men were then taken to Police Headquarters (R. 10, 15), where the defendant DiRe was again searched, and directed to empty his pockets (R. 6). This search resulted in the finding of two 100 gallon inventory coupons,

one A coupon, one C coupon and a number of fuel oil coupons (R. 6, 13).

DiRe was then locked up for about two hours, then searched a third time (R. 7, 14). This search revealed an envelope containing 100 additional coupons concealed under DiRe's shirt (R. 7, 14). No charge had as yet been placed against the defendant (R. 14); nor was any charge placed until the next morning, after he had been locked up all night (R. 14).

The fuel oil coupons, as well as the A and C gasoline ration coupons found upon the defendant, were conceded by the Government to be genuine (R. 17, 25). The two 100 gallon inventory coupons disclosed by the second search, when DiRe emptied his pockets, as well as the 100 coupons in the envelope, disclosed by the third search, were later determind to be counterfeit (R. 15, 24, 25).

The defendant was thereafter charged with illegal possession of counterfeit gasoline ration coupons in violation of Sec. 1394.8178 of Ration Order No. 5C, issued by the Office of Price Administration, in violation of Sec. 301 of the Second War Powers Act of 1942 (R. 3). The offense is a misdemeanor, the maximum penalty for violation thereof being one year imprisonment or a fine of $10,000.00, or both (O. P. A. Ration Order No. 5C, Sec. 1394.8301 (b); 7 F. R. 9135).

The facts of defendant's trial, conviction, sentence, appeal and the reversal by the Circuit Court of Appeals are sufficiently set forth in the brief for the United States, and we deem it unnecessary to repeat them here.

Summary of Argument.

1. The defendant's arrest was invalid, and the subsequent search of his person violated the Fourth Amendment.

The mere presence of the defendant in Buttitta's car at the time of the pre-arranged transfer of the two coupons from Buttitta to Reed did not constitute probable cause for the arrest and search of the defendant.

(a) The defendant's arrest and search cannot be justified under Section 177 (2) of the New York Code of Criminal Procedure, giving a peace officer the right to arrest without a warrant:

> "2. When the person arrested has committed a felony, although not in his presence."

The subsequent discovery of the counterfeit coupons concealed on the defendant's person cannot justify an illegal arrest and search, even though the search discloses the commission of a felony.

(b) Even though it be conceded *arguendo* that Buttitta and Reed were engaged in the commission of a conspiracy, a felony under Federal Law, the officers did not have reasonable cause for believing the respondent DiRe to have been engaged in the conspiracy. Hence the search cannot be justified under Sec. 177 (3) of the New York Code of Criminal Procedure, which authorizes an arrest without a warrant:

> "3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

2. The searches of defendant's person cannot be justified as an incident to the search of Buttitta's car. The doctrine of *Carroll* v. *United States*, 267 U. S. 132, cannot

be extended by implication to destroy the right of security in his person, which the Fourth Amendment gives to the defendant.

ARGUMENT.

I.

The respondent's arrest was unlawful and the subsequent searches of his person illegal.

This Court has consistently held that the Fourth Amendment and legislation regulating searches and seizures should be liberally construed in the individual's favor, to prevent impairment of the protection extended by the Constitutional Amendment (*Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Grace* v. *United States*, 278 U. S. 124, 128).

"An arrest may not be used as a pretext to search for evidence." (*United States* v. *Lefkowitz*, 285 U. S. 452, 467, citing *Go-Bart Importing Co.* v. *United States*, 282 N. S. 344.)

The language of *Weeks* v. *United States*, 232 U. S. 383, 393, although it dealt with the right to search the defendant's home rather than his person, applies with equal force to a search of the person incident to an arrest:

> "The efforts of the Courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those gerat principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

The right to search the defendant's person can only exist as an incident to a valid arrest (*Agnello* v. *United States*,

269 U. S. 20; *Marron* v. *United States*, 275 U. S. 192; *Gambino* v. *United States*, 275 U. S. 310; *Weeks* v. *United States*, 232 U. S. 383).

Exploratory or general searches, not incidental to a lawful arrest, and not based on probable cause, violate the prohibition of the Fourth Amendment, and evidence seized as the result of such searches will be suppressed (*Boyd* v. *United States*, 116 U. S. 616; *Weeks v. United States*, 232 U. S. 382; *Marron* v. *United States*, 275 U. S. 192).

A

Counsel for the United States attempts to justify the search of the defendant's person as an incident to a lawful arrest, under the second subdivision of Sec. 177 of the New York Code of Criminal Procedure "because, being in possession of counterfeit ration coupons, he had in fact committed a felony, though not in the presence of the officer." (p. 8, *Government's brief.*)

This argument is in direct contradiction to the long-established rule of the Federal Court that an arrest not based upon probable cause cannot be subsequently justified by the discovery of evidence showing the commission of a felony by the person searched.

Had DiRe been arrested, searched and prosecuted for crime in New York State, the coupons seized from his person would nevertheless be competent evidence, against him; and the original arrest, even though illegal, could be justified by the fruits of the search. (*People* v. *Defore*, 242 N. Y. 13, 18.)

The Federal Courts, however, have never allowed the end result to justify the means used to obtain it. The discovery of incriminating coupons upon the respondent's per-

son cannot be used as a basis to justify the original arrest, if there was no probable cause for the arrest and search of the defendant's person in the first place. (*Gambino v. United States*, 275 U. S. 310; *Agnello v. United States*, 269 U. S. 20; *Weeks v. United States*, 232 U. S. 383);

"A search prosecuted in violation of the Constitution is not made lawful by what it brings to light": (*Byars v. United States*, 273 U. S. 28, 29.)

We believe the Court below to have properly ruled that, assuming that Officer Gross had authority to arrest all three occupants of the car under Sec. 177 of the New York Code of Criminal Procedure, his authority to arrest DiRe must be found, not under subdivision 2, but under subdivision 3; " * * * that is, Gross must have had reasonable grounds for thinking that DiRe was a party to the conspiracy of Buttitta and Reed, which was in process of execution before his eyes." (*Majority Opinion Below*, R. 42.)

DiRe was never charged with conspiracy or with any felony. The offense for which he was indicted and convicted was a misdemeanor (R. 3). Neither under Federal law nor under the law of New York State would the officers have any right to arrest DiRe for a misdemeanor not committed in their presence, without a warrant (Sec. 177 *New York State Code of Criminal Procedure; People v. DeFore*, 242 N. Y. 13; *Carroll v. United States*, 267 U. S. 132).

There was no waiver by the defendant of his immunity to illegal search, nor any consent thereto. When he disgorged the contents of his pockets at Police Headquarters, it was no voluntary act, but under the direction and compulsion of the Police officer. The same is true of the second search at Police Headquarters, after he had been detained two hours, which disclosed the presence of the one hundred 100-gallon inventory coupons underneath his shirt. Such

submission to search under compulsion of the law's authority is not a waiver or consent *(Bram v. United States,* 168 U. S. 532).

B.

The officers' right to search the defendant's person as an incident to his arrest must therefore be justified, if at all, by the existence of probable cause for his arrest at the time of said arrest. The officers must have had reasonable cause to believe that DiRe had committed a felony, when they saw him sitting in Buttitta's car.

An officer "may arrest without a warrant when believed by the officer upon reasonable cause to have been guilty of a felony". *(Carroll v. United States,* 267 U. S. 132, 156.) The test of reasonable or probable cause must here be applied, whether or not the right of the officer to arrest the respondent is found in Sec. 177 (3) of the New York Code of Criminal Procedure, or the above stated Federal rule as set forth in *Carroll v. United States.* In either event, the rule is the same.

When the officers followed Buttitta's car it was in the knowledge that Buttitta was illegally to transfer gasoline ration coupons to Reed. Their purpose was to arrest Buttitta. They had no knowledge or information concerning DiRe, and did not even know that he was in the car. When the officers walked over to Buttitta's parked car, Reed, sitting in the back seat, had the two coupons in his hand. When asked where he got them, he told the officers that Buttitta had given them to him.

Buttitta's crime was then complete. The officers seized the evidence which was in Reed's hand, in plain sight. *(Stobble v. United States,* 91 Fed. 2nd. 69 (C. C. A. 7)).

Mere suspicion will not justify a search and seizure, whether it be of the person or of a building. In *Taylor v. United States,* 286 U. S. 1, this Court held that the odor of alcohol seeping from a garage, and the presence in the garage of piles of cardboard cases, visible through a window, did not justify the search and seizure of whiskey later found within the garage, without a search warrant.

In *Ex Parte Jackson,* 96 U. S. 727, this Court held that letters in transit in the United States mail are not subject to search and seizure without a search warrant; and that the individual's rights under the Fourth Amendment extend to papers closed against inspection wherever they may be.

"It would seem that the Constitutional guarantees of the Fourth Amendment would apply with more force to the person than to papers, houses and effects, and so the Courts have held." *(Cornelius, Search and Seizure,* p. 188.)

In *Gambino v. United States,* 275 U. S. 310, the defendant Gambino and another were arrested by New York State Troopers while travelling from Canada in the defendant Gambino's car. While no detailed statement of the facts is given in the opinion, the arrest and search of the defendant's car would appear to have been based merely upon a suspicion, later proved well grounded, that there was liquor in the car. The officers' belief was apparently based upon the appearance of the defendants, the fact that they were coming from Canada, and the previous experience of the State Troopers in similar searches of bootleggers' cars in that vicinity.

A search of the car revealed a quantity of intoxicating liquor, and the defendants were indicted and convicted of conspiracy to import and transport liquor in violation of

the National Prohibition Act. This Court reversed the conviction on the ground that the arrest of the defendants and the search of the defendant Gambino's car was not based on probable cause, and therefore illegal. With respect to the question presented in the present case, the following language of the Court in the *Gambino* case is significant (p. 312):

> "Their automobile *(while occupied by Gambino and therefore within the protection accorded to his person)* was searched without a warrant; and intoxicating liquor found therein was seized." (Italics ours.)

Counsel for the government contends that the majority decision below erred in misapplying the rule of substantive guilt, to the effect that mere knowledge of a conspiracy is not sufficient to establish guilt as a conspirator, in determining the validity of the respondent's arrest (pp. 9, 19, *Government's Brief*). The Government contends that mere proof that DiRe was present in Buttitta's car at the time of the transfer of the coupons from Buttitta's car to Reed afforded the officers probable cause for DiRe's arrest and subsequent search.

In support of this contention, the government relies upon the decisions of this Court in *Husty v. United States*, 282 U. S. 694, and *Dumbra v. United States*, 268 U. S. 435.

The government contends further that the fact that proof of association with known conspirators, proof of knowledge of the conspiracy, and proof of presence at the time of the commission of an overt act is competent evidence upon trial of an indictment for conspiracy, makes the mere presence of DiRe in Buttitta's car at the time of the illegal transaction between Buttitta and Reed sufficient and reasonable cause for the officers' believing DiRe to have been engaged in the commission of a felony, to wit, the conspiracy.

In *Dumbra v. United States*, 268 U. S. 435, the question was whether or not the affidavits of prohibition agents presented sufficient grounds for a search warrant. The affidavits showed that the defendant had a permit to manufacture non-beverage wine at certain premises, and that he operated a grocery store next door; that an agent had purchased wine from a son of the defendant on two different occasions at the grocery store. The Court held that these facts established probable cause, and affirmed an order denying a motion to quash a search warrant. In defining probable cause, the Court quoted with approval its previous decision in *Carroll v. United States*, 267 U. S. 132, 161:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

In *Stacey v. Emory*, 97 U. S. 642, 645, this Court defined probable cause as "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged".

We submit that neither the *Dumbra* nor the *Husty* decisions are authority against our contention that the mere presence of the respondent DiRe in Buttitta's automobile at the time of the transfer of the coupons from Buttitta to Reed did not constitute probable cause for his arrest and search.

In *Husty v. United States*, 282 U. S. 694, this Court followed its rule previously laid down in the *Carroll* and Dumbra cases that the search of an automobile for liquor was justified where the officer had reasonable cause to believe that the car contained contraband liquor. The Court there held that a prohibition agent, who had known the defendant Husty to be a bootlegger for several years, and who had received information from a hitherto reliable in-

formant that the defendant Husty would be transporting liquor in his car at a certain time and place; and who, upon approaching the defendant's car, saw the defendant's two companions flee from the car, had probable cause to arrest the defendant and search his car.

The government argues that, inasmuch as proof of association with known conspirators, knowledge of a conspiracy, and presence at the time of the commission of an overt act, is competent as proof of participation in a conspiracy, (p. 19-20, *Government's brief*), the "concurrence of all these factors at a particular time and place" (p. 20) constituted probable cause for the arrest and search of the respondent.

This argument is a mere repetition, in different language, of the contention that the mere prosence of DiRe in Buttitta's car at the time of the arrest constituted probable cause for his arrest and search. The only proof of "association with known conspirators" is proof of DiRe's presence in the car. The only proof of "knowledge of the conspiracy" is DiRe's presence in the car.

We submit that DiRe's presence in the car is not necessarily proof of knowledge on his part of the existence of a conspiracy. DiRe was sitting in the front seat, and Reed in the back seat. There is no proof that there was any conversation in the car between Buttitta and Reed, preliminary to the passing of the counterfeit coupons from Buttitta to Reed. Buttitta may have simply reached back and handed the coupons to Reed. Arrangements for the transfer, and even payment therefor by Reed, may very well have been made by Buttitta and Reed long before DiRe entered the automobile. The coupons were small enough that Buttitta could have handed them back to Reed

without DiRe's ever knowing what passed from Buttitta to Reed. For all we can gather from the record, Buttitta may have handed Reed the coupons before DiRe entered the car.

The only proof in the case is that when the officers came up to Buttitta's car, Reed was sitting in the back seat, with the two coupons in his hand. There is no proof that DiRe was even looking in Reed's direction. There is certainly no evidence in the case sufficient to warrant the inference that DiRe had any prior knowledge of a conspiracy between Buttitta and Reed, much less any reasonable ground for a legitimate belief that DiRe was a participant in the transaction.

The facts of the present case are far removed from the hypothetical case of the bank robber's guest, cited in the government's brief, (p. 22), or the case of "men found at midnight at a blockade still in full operation, located in the depths of a swamp", *(Beard v. United States,* (App. D. C.) 82 Fed. 2nd. 837, 844, referring to the facts in *Bilokumsky v. Tod,* 263 U. S. 149).

In *United States v. Valenti,* (C. C. A. 2) 134 Fed. 2nd 362, certiorari denied, 319 U. S. 761, cited by the government in support of its contention, the Circuit Court of Appeals affirmed the defendant's conviction for conspiracy to violate the Internal Revenue Laws relating to stills and intoxicating liquors. The question before the Court was the sufficiency of the evidence of conspiracy. No question of search or seizure was presented. In that case many overt acts of conspiracy on the part of the defendant and others over a six year period were shown. There was proof that other defendants had been connected with numerous other illicit distilleries; that the defendant received numerous phone calls from other defendants; that the defendant was

related to several other conspirators; that the cars and trucks of other conspirators were on many occasions parked at the defendant's home and garage, and that the defendant's car was frequently parked with other conspirators' cars over a period of several years.

In *Beard v. United States,* 82 Fed. 2nd. 837 (App. D. C.) certiorari denied 298 U. S. 655, the defendant Beard and twelve others were convicted of conspiracy to operate a gambling room, and the substantive offense of operation of a gambling room. There was evidence of a central gambling establishment in one building, with subsidiaries in the business section of the City of Washington. One defendant paid the rent, and the defendant Beard admitted owning much of the personal property in the gambling room. Others of the appellants were frequently seen going to and coming from the gambling room. There was evidence of slips, a switchboard, and eleven telephone lines in the room. All of the appellants were charged with the commission of one or more overt acts in furtherance of the conspiracy. At the time of the raid, the telephones were ringing, bets were being transmitted, and all of the appellants were sitting in the room in their shirt sleeves, with their coats hanging in an outer room.

In none of the cases cited by the government in support of its contention that DiRe's mere presence in the Buttitta car afforded probable cause for his arrest and search, was there any search of the person of the defendant.

The *Husty* case *(supra)* involved the search of a car, and the *Dumbra* case *(supra)* involved the search of premises.

The government's contention would require this Court to hold that every passenger in an automobile, no matter

how innocent, is subject to arrest and search by Federal officers, merely upon proof of commission of crime in the car by other occupants.

We do not believe that this Court is prepared to so far relax its vigilance in upholding the protection afforded the citizen by the Fourth Amendment, or to that extent destroy "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *". (*Fourth Amendment*).

In *Agnello v. United States*, 269 U. S. 20, the defendant was arrested and charged with conspiracy to violate the Harrison Narcotic Law. Upon his arrest, a search of his person revealed cocaine. The agents went further, and searched the defendant's home, several blocks away, finding more cocaine, which was introduced in evidence.

This Court reversed the conviction, holding that the right of search of the defendant's person, as an incident to a lawful arrest, does not extend to the defendant's home, without a search warrant.

In arguing for the affirmance of the conviction in the *Agnello* case, counsel for the government made the following argument (summary of government's argument, p. 25, *Agnello v. United States, supra*):

> "Sanctity of the home is no greater than sanctity of the person. *Indeed, the immunity of the person from arbitrary arrest is more highly prized than the immunity of the home from arbitrary search.*" (Italics ours.)

In *United States v. Falcone* (311 U. S. 205) this Court held that one who sells materials knowing that they are intended for use, or will be used, in the production of illegal liquor, but not knowing of a conspiracy to commit the

crime, was not chargeable as a co-conspirator. (See discussion in opinion of Court below, R. 43).

We further submit that no distinction can be made with respect to the respondent's immunity from unreasonable search of his person because of the fact that the object of the search was contraband, rather than legitimate personal papers or records. (*Boyd v. United States*, 116 U. S. 616).

The right to search DiRe's *person* was entirely dependent on the right to arrest. The validity of the search and seizure in no way depended on the nature of the property seized.

II.

The search of respondent's person cannot be justified as incidental to the search of Buttitta's car.

In *Carroll* v. *United States*, 267 U. S. 132, 158, this Court held that the right to search an automobile for contraband liquor was not dependent on the right to arrest the driver, but was solely dependent on whether or not the officer had reasonable to cause to believe that the automobile contained the contraband liquor. The government now seeks to extend the rule of the *Carroll* case by implication to permit search of all occupants of the car as part of the search of the car itself. (p. 26, *Government's brief.)*

The Court's decision in the *Carroll* case traced at some length the history of the various Federal Statutes relative to seizure of contraband goods in transit, as opposed to contraband goods located in a building, pointing out that the reason for its distinction between the necessity for a

search warrant in the case of a building and in that of an automobile lies in the fact that it would not be practicable to secure a search warrant for the vehicle, because it can be quickly moved out of the jurisdiction in which the warrant must be sought. (p. 153.)

The Court further pointed out (p. 158):

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

The Court further pointed out that "the seizure in such a proceeding comes before the arrest * * *" (p. 159).

If we are to extend the rule of the *Carroll* case to authorize the search of passengers in the car as part of the search of the car itself, the reason for the rule must logically demand its application to every pedestrian on the street. A pedestrian, suspected of carrying contraband, can flee the jurisdiction just as effectively as any vehicle.

In the *Carroll* case, the agents had no right to arrest the defendant, since the offense committed was a misdemeanor. Would it not therefore be just as logical to apply the rule of the *Carroll* case to the pedestrian, and allow a suspicious Federal officer, with reasonable cause to believe that the pedestrian was carrying contraband, to first stop him, search him, seize the contraband and then arrest him for the misdemeanor of possession?

The law of the Carroll case is not sufficiently elastic to reach the point to which the government here seeks to stretch it. The government's contention puts the respondent DiRe in exactly the same category as the upholstery or compartments of Buttitta's car.

We do not believe that this Court is prepared to hold that a citizen waives the personal protection of the Fourth Amendment every time he steps into an automobile.

In *Stobble v. United States* (C. C. A. 7) 91 Fed. 2nd 69, cited by the government in support of its argument, Federal narcotic agents, armed with previous information, followed the defendant to her own car, and known to the agents to be her own car, carrying two small envelopes of the same size and color in which heroin was ordinarily carried. Upon approaching the car, the agents saw the two small envelopes lying in plain view on the defendant's lap, in the car.

In *Cassidy v. United States*, 49 Fed. 2nd 504, also cited by the government on this point, prohibition agents, armed with knowledge of previous convictions of the defendant for bootlegging, and having previously observed him removing upholstery from his car, followed the defendant to a point where he stopped his car, and saw him take a pint bottle from the car and put it in his hip pocket.

Counsel for the government concedes that in both the *Stobble* and *Cassidy* cases, the persons from whom the contraband was taken were legally arrested (p. 28, *government's brief*). Nevertheless, it is argued, the seizure of the contraband was treated in each case by the Court as a part of the search of the vehicle.

Conceding this point for argument's sake, the all-important distinction between the cited cases and the present case is that in the *Husty, Stobble* and *Cassidy* cases, the person searched and arrested was the owner of the car, not a mere passenger. We will further concede, for the sake of argument, the right of the officers in the present case to arrest Buttitta, the known owner of the car, either as an incident to his arrest for possession and transporta-

tion of the two coupons found in Reed's hand, or based on probable cause justifying a search of his car under the rule of the *Carroll* case. We submit that neither of the three above cited cases is authority for the further extension of the right of search to a passenger in Buttitta's car.

Counsel for the government further contends that the right to search the defendant's person, as a necessary incident to the search of the automobile itself, included the right to take the respondent to Police Headquarters, several miles away, because "the taking of the occupants of the car to the station house for the purpose of search *did not amount to an arrest*, and the validity of such action need not be judged by the rules governing the right of arrest." (p. 29, *government's brief;* italics ours.) This assertion ignores the undisputed fact that the respondent was in fact placed under arrest at the car (R. 5, 10), and had already been subjected to a preliminary search of his person at the car, which revealed no coupons (R. 9, 15). We submit that the officers' right to search the person of the respondent must be governed by what actually occurred, not by a hypothetical situation in which the officers merely escorted the respondent to the station house for the purpose of search prior to arrest (p. 29, *government's brief*).

Conclusion.

The incriminating coupons were taken from the respondent by means of an illegal search, not based on a valid arrest. The mere presence of DiRe as a passenger in Buttitta's car at the time the two counterfeit coupons were found in Reed's hand, did not constitute probable cause for DiRe's arrest.

Nor can the doctrine of *Carroll* v. *United States* be extended to authorize the search of the respondent's person, independent of the right to arrest, as a part of the search of Buttitta's car. The government's attempt to thus whittle away the protection afforded the citizen with respect to his person, by the Fourth Amendment, should not be sanctioned.

In the words of the Court below (R. 44):

> "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberty, is a delusion."

Respectfully submitted,

JOHN F. CONNELLY,
CHARLES J. McDONOUGH,
Attorneys for Respondent.

Dated: October 8, 1947.

0.5

SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1947.

The United States of America, Petitioner, v. Michael Di Re.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 5, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Michael Di Re was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of § 301 of the Second War Powers Act, 1942.[1] The decisive evidence was that obtained by search of his person, after he was arrested without a warrant of any kind. The Circuit Court of Appeals, Second Circuit, considered that any question as to the timeliness of his objection to this evidence was eliminated by its disposition on its merits by the District Court, and, one judge dissenting, it held both his search and arrest to have been illegal. The Government was granted certiorari,[2] raising no question other than the correctness of the holding by the Court of Appeals that the evidence was the fruit of an illegal arrest and search.

An investigator of the Office of Price Administration was informed by one Reed that he was to buy counterfeit gasoline ration coupons from a certain Buttitta at a named place in the City of Buffalo, New York. The investigator and a detective from the Buffalo Police Department trailed Buttitta's car and finally came upon it parked at the appointed place. They went to the car and found the informer Reed, the only occupant of the rear seat, holding

[1] 50 U. S. C. App. Supp. V. § 633.
[2] —. U. S. —.

in his hand two gasoline ration coupons which later proved to be counterfeit. Reed, on being asked, said he obtained them from Buttitta, who was sitting in the driver's seat. Beside Buttitta sat Di Re. All three were taken into custody, "frisked" to make sure they had no weapons and were then taken to the police station. Here Di Re complied with a direction to put the contents of his pockets on a table. Two gasoline and several fuel oil ration coupons were laid out. He said he had found them in the street. About two hours later, after questioning, he was "booked" and thoroughly searched. One hundred inventory gasoline ration coupons were found in an envelope concealed between his shirt and underwear. These, as well as the gasoline coupons earlier disclosed, proved to be counterfeit. Their introduction as evidence, over the objection of the defendant, was held by the court below to require reversal of the conviction.[1]

I.

The Government now defends the search upon alternative grounds: 1, that search of Di Re was justified as incident to a lawful arrest; 2, that search of his person was justified as incident to search of a vehicle reasonably believed to be carrying contraband. We consider the second ground first.

The claim is that officers have the right, without a warrant, to search any car which they have reasonable cause to believe carries contraband, and incidentally may search any occupant of such car when the contraband sought is of a character that might be concealed on the person. This contention calls, first, for a determination as to whether the circumstances gave a right to search this car.

The belief that an automobile is more vulnerable to search without warrant than is other property has its

[1] 159 F. 2d 818.

source in the decision of *Carroll* v. *United States*, 267 U. S. 132. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and of that Act alone. Transportation of liquor in violation of that Act subjected first the liquor, and then the vehicle in which it was found, to seizure and confiscation, and the person "in charge thereof" to arrest.[4] The Court reviewed the legislative history of enforcement legislation and concluded (at p. 147), "The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in[5] the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable."

---

[4] Section 26, Title II of the National Prohibition Act provided in part as follows: "When . . . any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof . . . ." In the *Carroll* case it was said (267 U. S. at 155) that this section was intended "to reach and destroy the forbidden liquor in transportation and the provision for forfeiture of the vehicle and the arrest of the transporter were incidental"; and (267 U. S. at 158) "the right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as Section 26 indicates . . . ."

[5] This word "in" is erroneously printed "is" in the case as reported.

The progeny of the *Carroll* case likewise dealt with searches and seizures under this Act. *Husty* v. *United States*, 282 U. S. 694.

Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable," the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so. The most that can be said is that some of the language by which the Court justified the search and seizure legislation in the *Carroll* case might be used to make a distinction between what is a reasonable search as applied to an automobile and as applied to a residence or fixed premises, even in absence of legislation.

We need not decide whether, without such Congressional authorization as was found controlling in the *Carroll* case, any automobile is subject to search without warrant on reasonable cause to believe it contains contraband. In the case before us there appears to have been no search of the car itself. No one on the spot seems to have thought there was cause for searching it, or that it was subject to forfeiture. The nature of ration tickets, the contraband involved, was not such that a car would be necessary or advantageous in carrying them except as an incident of carrying the person. When the question of admissibility of this evidence arose in the trial court, counsel for the Government made no claim that there had been search or cause for search of the car. No question of fact concerning such a claim has been resolved by the trial court or the jury.

Assuming, however, without deciding, that there was reasonable cause for searching the car, did it confer an

incidental right to search Di Re? It is admitted by the Government that there is no authority to that effect, either in the statute or in precedent decision of this Court, but we are asked to extend the assumed right of car search to include the person of occupants because "common sense demands that such rights exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person."

This argument points up the different relation of automobile to the crime in the *Carroll* case than in the one before us. An automobile, as was there pointed out, was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband. But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver.

The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could

we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

II.

The other ground on which the Government defended the search of Di Re, and the only one on which it relied at the trial, is that the officers justifiably arrested him and that this conferred a right to search his person. If he was lawfully arrested, it is not questioned that the ensuing search was permissible. Hence we must examine the circumstances and the law of arrest.

Some members of this Court rest their conclusion that the arrest was invalid on § 180 of the New York Code of Criminal Procedure which requires an officer making an arrest without a warrant to inform the suspect of the cause of arrest, except when it is made during commission of the crime or when in pursuit after an escape.* This question was first raised from the Bench during argument in this Court. Di Re did not assert this ground of invalidity at the trial. Had he done so the Government might have met it with proof of circumstances which in themselves would show that Di Re had been effectively informed,

* Section 180 provides:

"When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape."

See also *People* v. *Marendi*, 213 N. Y. 600, 610. Cf. *John Bad Elk* v. *United States*, 177 U. S. 529; *Christie* v. *Leachinsky* (1947) 1 All Eng. 567.

even if the circumstances fell short of establishing the statutory exception. The proceedings below did not develop the facts concerning Di Re's arrest in connection with this requirement. Inasmuch as the issue would lead to exploration of the law as to waiver when the defense was not raised in either court below, or indeed by the petition here, and as to applicability of the statute if, as the Government contends, lack of express declaration was unnecessary because circumstances supplied the required information, we do not undertake to determine on this record whether Di Re's arrest satisfied this provision of the New York law.

The arrest was challenged in the courts below on the ground that it violated another provision of New York law which was considered to be controlling on the subject. The court below assumed that the arresting officer, a state officer, derived his authority to arrest Buttitta and Reed, although it was for a federal crime, from § 177 of the New York Code of Criminal Procedure, and also considered the legality of the arrest of Di Re under paragraph 3 thereof.[1] In this Court the Government originally argued that the arrest was authorized under both paragraphs 2 and 3 of the State law, but in a supplemental brief the Government withdraws the suggestion "that the arrest of respondent can be justified under subsection 2 of section 177 of the New York Code of Criminal Procedure." Instead, it now urges that "the validity of an arrest without a warrant for a federal crime is a matter of federal law to be determined by a uniform rule applicable in all federal courts."

---

[1] Section 177 of the New York Code of Criminal Procedure provides: "A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode of process against offenders in such state."[8] There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject. If we were to try to find or fashion a federal rule for arrest without warrant, it appears that the federal legislative materials are meager, inconsistent and inconclusive. Federal Bureau of Investigation officers are authorized only "to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person

[8] The Act of September 24, 1789 (Ch. 20, § 33, 1 Stat. 91), concerning arrest with warrant, provided: "That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." This provision has remained substantially similar to this day. 18 U. S. C. § 591. See also 1 Ops. Atty. Gen. 85, 86.

escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer."[9] However, marshals and their deputies "shall have the power to make arrests without warrant for any offense against the laws of the United States committed in their presence or for any felony cognizable under the laws of the United States in cases where such felony has in fact been or is being committed and they have reasonable grounds to believe that the person to be arrested has committed or is committing it,"[10] and they are also given the same powers as sheriffs in the same state may have, by law, in executing the laws thereof.[11]

In denouncing unlawful search by federal officers as a misdemeanor, Congress provided that it should not apply to one "arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent or employee, or who has committed, or who is suspected on reasonable grounds of having committed a felony."[12] Thus the legislative sources, while yielding some common provisions, also contain many inconsistencies. No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.

Since, under that law, any valid arrest of Di Re, if for a misdemeanor must be for one committed in the arresting officer's presence, and if for a felony must be for one which the officer had reasonable grounds to believe the suspect

[9] 48 Stat. 1008, 49 Stat. 77, 5 U. S. C. § 300 (a).
[10] 49 Stat. 378, 28 U. S. C. § 504 (a).
[11] 1 Stat. 425, 12 Stat. 282, 28 U. S. C. § 504.
[12] 49 Stat. 877, 18 U. S. C. § 53 (a).

had committed, we seek to learn for what offense this man was taken into custody. The arresting officer testified that he did not tell Di Re what he was being arrested for. After he was taken to the station he was "booked," but the record does not show upon what charge. He was later indicted for the misdemeanor of knowingly possessing counterfeit gasoline ration coupons in violation of Ration Order No. 5 (c) of the Office of Price Administrator. But on appeal the Government suggested the arrest may be defended as one for a felony because probable grounds existed for believing him guilty of the felony of conspiracy under § 37 of the Criminal Code,[13] and in this Court for the first time it suggests that there were grounds for arrest on a charge of possessing a known counterfeit writing with intent to utter it as true for the purpose of defrauding the United States, a felony under § 28 of the Criminal Code.[14]

Assuming, without deciding, that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable grounds to believe any felony found in the statute books had been committed, we are brought to the inquiry whether the circumstances at that time afforded such grounds.

The Government now concedes that the only person who committed a possible misdemeanor in the open presence of the officer was Reed, the Government informer who was found visibly possessing the coupons. Of course, as to Buttitta they had previous information that he was to sell such coupons to Reed, and Reed gave information that he had done so. But the officer had no such information as to Di Re. All they had was his presence, and if his presence was not enough to make a case for arrest for a misdemeanor, it is hard to see how it was

[13] 18 U. S. C. § 88.
[14] 18 U. S. C. § 72.

enough for the felony of violating § 28 of the Criminal Code.

The relevant difference between Ration Order 5 (c) and § 28 of the Criminal Code is that the former declares mere possession of a counterfeit coupon an offense, while the latter defines a felony which consists not merely of possession but also of knowledge of the instrument's counterfeit character, and also of intent to utter it as true. It is admitted that at the time of the arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference. Of course they had no information hinting further at the knowledge and intent required as elements of the felony under the statute.

III.

The Government's defense of the arrest relies most heavily on the conspiracy ground. In view of Reed's character as an informer, it is questionable whether a conspiracy is shown. But if the presence of Di Re in the car did not authorize an inference of participation in the Buttitta-Reed sale, it fails to support the inference of any felony at all.

There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject. Reed, the informer, certainly knew it if any part of his transaction was in Di Re's presence. But he was not called as a witness by the Government, nor shown to be unavailable, and we must assume that his testimony would not have been helpful in bringing guilty knowledge home to Di Re.

An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who "accompanies a criminal to a

crime rendezvous" cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings.

Moreover, whatever suspicion might result from Di Re's mere presence seems diminished, if not destroyed, when Reed, present as the informer, pointed out Buttitta, and Buttitta only, as a guilty party. No reason appears to doubt that Reed willingly would involve Di Re if the nature of the transaction permitted. Yet he did not incriminate Di Re. Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.

IV.

The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A

layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.

It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers is unwarranted. Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman. It is the officer's responsibility to know what he is arresting for, and why, and one in the unhappy plight of being taken into custody is not required to test the legality of the arrest before the officer who is making it.

The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up.[15] In law it is good or bad when it starts and does not change character from its success.

V.

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the les-

[15] See, for example, *Byars* v. *United States*, 273 U. S. 28, 29.

sons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK dissent.